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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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No. 81

**LIDE THOMPSON, MATTIE THOMPSON, MARY
TUCKER, VERA THOMPSON, JIM THOMPSON,
ALINE UTSEY, KILLA MCINTYRE AND RUTH Mc
INTYRE**

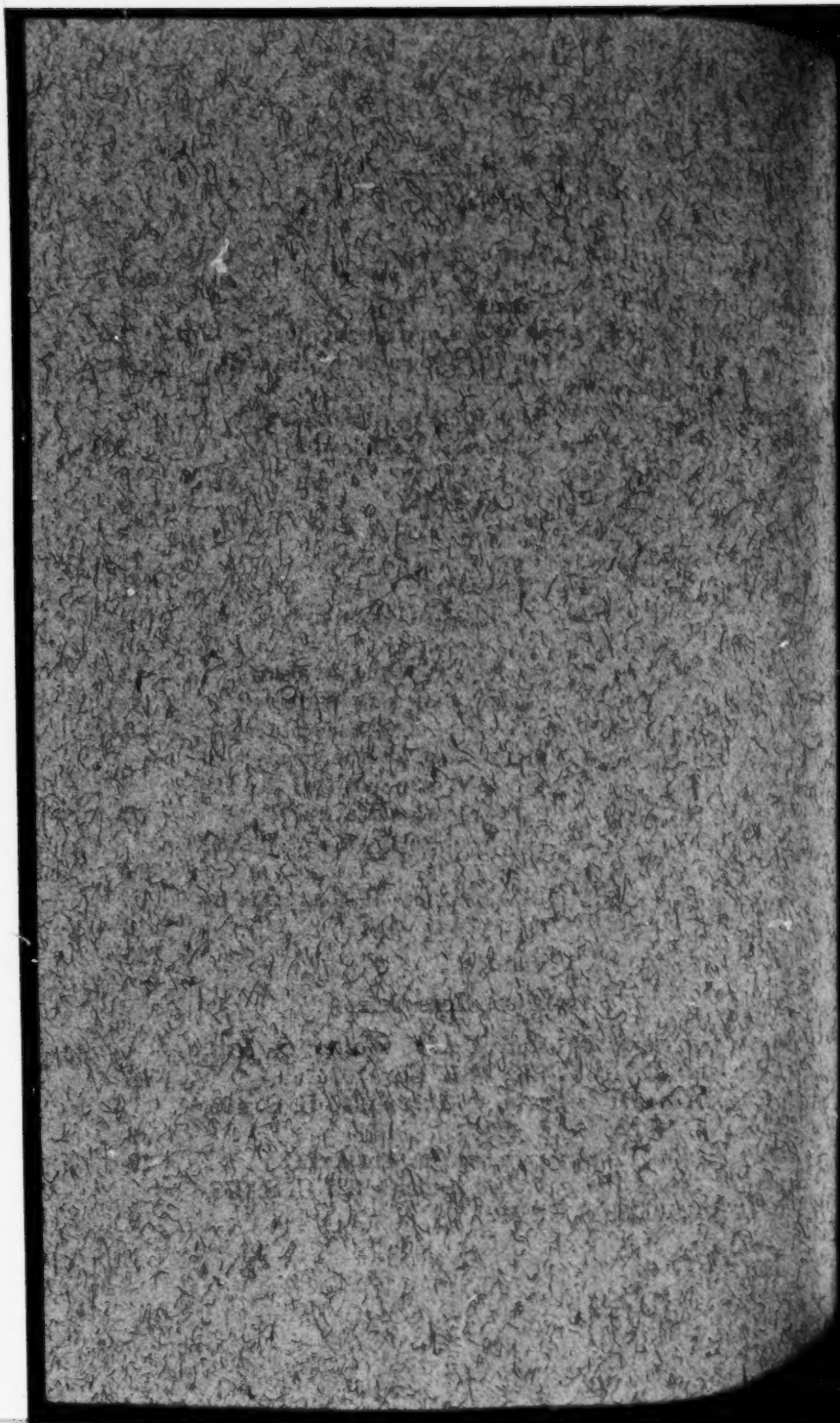
Petitioners,

**LUTHER THOMPSON AND H. T. PATTON, Executors of
THE ESTATE OF Dr. S. A. THOMPSON, Deceased**

Respondents.

**PETITION FOR WRIT OF HABEAS CORPUS TO THE
SUPREME COURT OF ARKANSAS, AND BRIEF IN
SUPPORT THEREOF**

**C. M. MARTIN,
HENRY B. WHITLEY,
J. R. WILSON,
Counsel for Petitioners.**



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 853

LIDE THOMPSON, MATTIE THOMPSON, MARY
TUKES, VERA THOMPSON, JIM THOMPSON,
ALINE UTSEY, RILLA MCINTYRE AND RUTH MC-
INTYRE *Petitioners,*

vs.

LUTHER THOMPSON AND H. T. PATTON, EXECUTOR OF
THE ESTATE OF DR. S. A. THOMPSON, DECEASED,
Respondents.

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of Lide Thompson, Mattie Thompson, Mary Tukes, Vera Thompson, Jim Thompson, Aline Utsey, Rilla McIntyre and Ruth McIntyre respectfully shows to this Honorable Court:

(A)

Summary Statement of the Matter Involved

William Thompson, a negro, who resided in Ouachita County, Arkansas, departed this life intestate on or about May 1st, 1933, and there survived him seven children, to-wit: Luther Thompson, Jim Thompson, Lide Thompson, Dave

Thompson, Della (Rilla) Tukes (R. 38). Luther Thompson, a son, one of the respondents herein was appointed Administrator of the Estate of William Thompson, Deceased (R. 40). S. A. Thompson, hereinafter referred to as Dr. S. A. Thompson, and Roy Smith were sureties on the Administrator's bond (R. 39). Luther Thompson, the Administrator, filed his inventory on August 27, 1934 (R. 41), and the inventory was approved by the Probate Court on Ouachita County, Arkansas, on August 30, 1934 (R. 44).

After the appointment of Luther Thompson as Administrator, there was paid to him as such Administrator, the sum of \$250.00 as rent from some of the lands of the estate (R. 6), making a total of \$996.39 worth of personal property, \$544.39 of which was cash or bank deposits, that was charged to the Administrator, and for which he was accountable (R. 6 & 41).

"Three claims were filed against the estate. Stephens Drug Co. filed its claim in the sum of \$54.35, but the claim was allowed in the sum of \$43.48 (R. 41). Dr. S. A. Thompson, the surety, filed his claim on an account in the sum of \$558.42. Both of the above claims were filed and allowed within the statutory period of non-claim."

Smith Bros. & Co., of which Roy Smith, the surety, was Vice President and General Manager, filed its claim on April 28, 1936 (R. 36), in the amount of \$250.00, which claim was allowed in that amount on that date (R. 45). The filing and allowance of such claim was long after the running of the statute of non-claim.

On the 27th day of June, 1936, the Probate Court of Ouachita County, Arkansas, entered its order, directing a sale of the 320 acres of land owned by William Thompson at his death, in order to pay the claims of Dr. S. A. Thompson and Smith Bros. & Co. (R. 46). The Administrator had never accounted for any part of the personal property, except the sum of \$43.48 (R. 47), which he had paid to the Stephens Drug Co. in satisfaction of its claim. The 320

acres of land was sold to Dr. S. A. Thompson, the surety, on the Administrator's bond, and claimant against the estate, for the sum of \$1,075.00 (R. 48). The sale was purportedly approved on the 27th day of July, 1936, and the Administrator's deed was executed and delivered to Dr. S. A. Thompson on that date (R. 48).

The Administrator on October 27, 1936, filed his first and final settlement, accounting only for the proceeds of the sale of the 320 acres of land (R. 50). On January 20, 1937, the Probate Court, Ouachita County, Arkansas, approved the first and final settlement of the Administrator (R. 51). There was never, at any time, an accounting for the personal property, except the sum of \$43.48.

July 25, 1941, petitioners herein filed their complaint in the Probate Court of Ouachita County, Arkansas, seeking to set aside the purported sale of the 320 acres of land under the orders of the Probate Court, above mentioned, and an accounting from the Administrator and his sureties (R. 5). The cause of action was based upon the fraud that was practiced upon the Court in procuring the order to sell the land when the personal estate was sufficient to pay all claims and upon the proposition that the Probate Court of Ouachita County, Arkansas, was without jurisdiction to order the land sold and its orders and judgments were null and void for that reason (R. 5).

After considerable delay the Probate Court of Ouachita County, Arkansas, sustained a motion to dismiss the cause of action for want of jurisdiction on November 23, 1946; however, the Probate Court also entered a finding and judgment of dismissal barring petitioners upon the merits of the cause of action (R. 22).

The death of Dr. S. A. Thompson occurred on November 24, 1946, but the cause was properly revived in the name of the executor, respondent herein (R. 24). Petitioners sought and obtained leave to file amended and substituted

complaint (R. 25). The amended and substituted complaint raised the question that petitioners were deprived of their property without due process of law (R. 25). The amended and substituted complaint was likewise dismissed for want of jurisdiction and because it was subject to the same objection as the original complaint (R. 32).

Upon the appeal the Supreme Court of Arkansas affirmed the orders and judgments of the Probate Court in all things (R. 55), and further held that the Probate Court correctly exercised its discretion in dismissing the cause of action (R. 52).

(B)

Reason Relied Upon For the Allowance of the Writ

1. Upon the death of William Thompson title to the 320 acres of land vested in his descendants, his children, subject to be divested by the order of the Probate Court, if need be, to pay debts of the estate.

2. The approval of the inventory by the Probate Court gave it the effect of being *prima facie* correct, subject to be overcome by competent evidence.

3. The order and judgment ordering a sale of the 320 acres of land for the purpose of paying the debts of the estate capriciously and arbitrarily disregarded the *prima facie* effect of the inventory and approval thereof and the statute thereon.

4. The orders and judgments of the Probate Court of Ouachita County, Arkansas, for a sale of the 320 acres of land, deprives petitioners of their property without due process of law, in that petitioners are denied the benefits and the application of the Statute making the inventory *prima facie* correct and the said Court was without jurisdiction to enter the orders for the sale of the land when the

inventory showed there was sufficient personal assets to pay all the debts of the estate.

5. The filing and allowance of the claim of Smith Bros. & Co. after it was barred by the Statute of non-claim deprived petitioners of the benefits of the non-claim statute.

6. If the Probate Court of Ouachita County, Arkansas, was without jurisdiction, any judgment on the merits barring petitioners is capricious and arbitrary.

7. If the Probate Court of Ouachita County, Arkansas, had jurisdiction, any judgment on the merits, or contrary to the pleadings is capricious and arbitrary, without evidence upon which to base such judgment.

8. If the Probate Court of Ouachita County, Arkansas, was without jurisdiction of the cause of action, it had no discretion and could exercise no discretion; if the said Probate Court had jurisdiction, its dismissal of the cause of action was a capricious and arbitrary exercise of discretion.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Arkansas, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8291, Lide Thompson, et al., Appellants, vs. Luther Thompson, et al., Appellees, and that the said judgment of the Probate Court of Ouachita County, Arkansas, and the Supreme Court of Arkansas, may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the

premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

LIDE THOMPSON,	MARY TUKES,
MATTIE THOMPSON,	ALINE UTSEY,
VERA THOMPSON,	RILLA MCINTYRE,
JIM THOMPSON,	RUTH MCINTYRE,

By C. M. MARTIN,
HENRY B. WHITLEY,
J. R. WILSON,
Attorneys for Petitioners;
By J. R. WILSON.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 853

LIDE THOMPSON, MATTIE THOMPSON, MARY
TUKES, VERA THOMPSON, JIM THOMPSON,
ALINE UTSEY, RILLA McINTYRE AND RUTH Mc-
INTYRE,

Petitioners,

vs.

LUTHER THOMPSON AND H. T. PATTON, EXECUTORS
OF THE ESTATE OF DR. S. A. THOMPSON, DECEASED,

Respondents

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

I

The Opinions of the Courts Below

The opinion of the Supreme Court of Arkansas has not been officially reported at this time. The opinion was dated January 19th, 1948 (R. 52).

II

Jurisdiction

1. Petition for re-hearing was denied by the Supreme Court of Arkansas on March 8th, 1948 (R. 60).

2. Petitioners, by amended and substituted complaint, filed on January 15, 1947, in the Ouachita Probate Court, with the Court's permission set forth a claim that the judgment or orders of the Court deprived said petitioners of their property without due process of Law as provided by the 14th Amendment to the Constitution of the United States (R. 29). Petitioners by a petition for a re-hearing, filed in the Supreme Court of Arkansas in due time, claimed that they had been deprived of their property without due process of Law, in that their land was sold for the alleged purpose of paying debts of the estate when there was sufficient personal property to pay all claims (R. 58). Petitioners also in the petition for re-hearing in the Supreme Court of Arkansas, claimed that the action of said Court in holding that the Court below correctly exercised its discretion in the matter deprived the petitioners of their property without due process of Law (R. 58). The petition for re-hearing further claimed that Petitioners were denied due process of law by the action of the Court below, and the affirmance thereof by the Supreme Court of Arkansas, in finding that petitioners were barred on the merits of the controversy without evidence before the Court upon which to base such findings and by the presumption indulged in contrary to the facts reflected by the record and alleged in the pleadings (R. 59). The claim made in the amended and substituted complaint was passed by the lower Court without comment (R. 32). The claim made in the amended and substituted complaint was passed by the Supreme Court of Arkansas without comment (R. 52). The petition for

re-hearing in which the Federal questions were raised was denied and overruled without comment on March 8th, 1948 (R. 60).

3. Jurisdiction of this Court is invoked under the authority of Section 237 of the Judicial Code as amended, Sub-Paragraph (b) on the ground that there is specially set up and claimed by Petitioners a right, titled or privileged under the Constitution of the United States as set forth in the 14th Amendment thereof.

4. It is believed that the following cases sustain the jurisdiction of this Court:

Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567;

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064;

Home Teleph. Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. Ed. 510, 33 S. Ct. 312;

Cuyahoga River Power Co. v. Akron, 240 U. S. 462, 60 L. Ed. 743, 36 S. Ct. 402;

Iowa-Des Moines National Bank v. Bennett, 284 U. S. 239, 76 L. Ed. 265.

III

Statement of the Case

NOTE: A full statement of the case has been given under heading "A" in the Petition for Writ of Certiorari herein, and in the interest of brevity, the statement will not be repeated under this point.

IV

Specification of Errors

1. The Probate Court of Ouachita County, Arkansas, and the Supreme Court of Arkansas, erred in not finding

and holding that said Probate Court was without jurisdiction to order Petitioners' land sold for the purpose of paying the debts of the Estate of William Thompson, Deceased, when there was sufficient personal assets to discharge all obligations.

2. The Probate Court of Ouachita County, Arkansas, and the Supreme Court of Arkansas erred in not finding and holding that the inventory approved by the said Probate Court *prima facie* showed that there was sufficient personal assets to pay all obligations of the estate.

3. The Probate Court of Ouachita County, Arkansas, and the Supreme Court of Arkansas erred in finding and holding that Petitioners were barred on the merits of the controversy without any evidence to sustain such finding and holding, and in contradiction of the pleadings and the record.

4. The Probate Court of Ouachita County, Arkansas, and the Supreme Court of Arkansas erred in making any finding or entering any holding on the merits of the controversy, if the said Probate Court was without jurisdiction of the cause of action.

5. The Supreme Court of Arkansas erred in finding and holding that the Probate Court of Ouachita County, Arkansas, correctly exercised its discretion in dismissing Petitioners' cause of action.

ARGUMENT**Summary of Argument**

POINT A. UPON THE DEATH OF WILLIAM THOMPSON, TITLE TO ALL OF HIS REAL ESTATE DESCENDED TO AND VESTED IN HIS HEIRS AT LAW, SUBJECT TO BE DIVESTED OUT OF THEM, IF NEED BE, TO PAY THE DEBTS OF THE ESTATE.

POINT B. THE FILING OF THE INVENTORY BY THE ADMINISTRATOR, TOGETHER WITH THE SHOWING THAT ADDITIONAL PERSONAL ASSETS CAME TO HIS HANDS AS ADMINISTRATOR, MADE A PRIMA FACIE SHOWING THAT THERE WAS SUFFICIENT PERSONAL ASSETS TO PAY ALL OBLIGATIONS OF THE ESTATE, AND UNTIL PROPER DISPOSITION WAS MADE OF THE PERSONAL ASSETS, THE PROBATE COURT WAS WITHOUT JURISDICTION TO ORDER A SALE OF THE REAL ESTATE TO PAY THE DEBTS OF THE ESTATE.

POINT C. THE PROBATE COURT OF OUACHITA COUNTY, IN ORDERING THE LAND SOLD WITHOUT MAKING PROPER DISPOSITION OF THE PERSONAL PROPERTY, AS REQUIRED BY LAW, DEPRIVED PETITIONERS OF THE BENEFITS OF THE STATUTES OF ARKANSAS.

POINT D. UNDER THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AS A PART OF DUE PROCESS OF LAW, PETITIONERS ARE ENTITLED TO THE BENEFITS OF THE STATUTES OF THE STATE OF ARKANSAS.

POINT E. THE JUDGMENT DISMISSING PETITIONERS' COMPLAINT UPON THE MERITS OF THE CONTROVERSY, BY A COURT THAT WAS HELD TO LACK JURISDICTION OF THE CAUSE OF ACTION, DEPRIVED PETITIONERS OF THE RIGHTS GUARANTEED TO THEM BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

POINT F. THE FINDING AND HOLDING BY THE SUPREME COURT OF ARKANSAS THAT THE PROBATE COURT OF OUACHITA COUNTY, ARKANSAS, CORRECTLY EXERCISED ITS DISCRETION DEPRIVED PETITIONERS OF DUE PROCESS OF LAW, UNLESS SAID PROBATE COURT WAS HELD TO HAVE JURISDICTION OF THE CAUSE OF ACTION; IF THE PROBATE COURT HAD JURISDICTION THE HOLDING OF THE SUPREME COURT OF ARKANSAS THAT THE PROBATE COURT CORRECTLY EXERCISED ITS DISCRETION IN DISMISSING PETITIONERS' CAUSE OF ACTION DEPRIVES PETITIONERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, WITHOUT EVIDENCE UPON WHICH TO BASE THE ACTION OF COURT, AND IN CONTRADICTION OF THE PLEADINGS AND THE RECORD.

POINT A

Vesting of Title to the Real Estate

The law of descent and distribution of the State of Arkansas (Section 4338 of Pope's Digest, the Laws of Arkansas) provided:

"When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of the debts and the widow's dower in the following manner:

"First: To children or their descendants, in equal parts. * * *

* * * * *

Therefore, upon the death of William Thompson, title to the three hundred twenty acres of land descended to, and vested in petitioners subject to the widow's dower and the payment of his debts. The order of the Probate Court directing a sale of the land found that there was no widow (R. 47).

Section 148 of Pope's Digest of the Laws of Arkansas provides that lands and tenements shall be assets in the hands of every executor or administrator for the payment of the debts of the testator or intestate. Section 149 of Pope's Digest of the Laws of Arkansas provides:

"* * * If any person, being the owner of lands and tenements, die intestate and such * * * intestate shall not have sufficient personal estate to pay his debts, it shall be the duty of the * * * administrator to apply to the Court of Probate by petition, describing said lands and containing a true and just account of all the debts of the * * * intestate

which shall come to his knowledge and the amount of the assets in his hands to pay such claim."

The Law of Arkansas provides that such petition shall be verified. Section 151 of Pope's Digest of the Laws of Arkansas provides:

"On the presentation of such petition to the Court accompanied by the appraisement and list of sale of the personal property of such estate, if the Court shall be satisfied that the personal estate is insufficient to pay the debts of such * * * intestate, the Court shall order and direct the sale of such lands as are set forth in such petition, or as much thereof as in the opinion of the Court may be sufficient to pay the debts of the deceased."

Under the above quoted Statutes, the Supreme Court of Arkansas has ruled that lands are assets in the hands of an administrator only when personalty is insufficient to pay the debts of the Estate. *Doke v. Benton County Lbr. Co.*, 114 Ark. 1.

Therefore, under the Statutes of Arkansas and the decisions of the Supreme Court of Arkansas, jurisdiction of the Probate Court to order a sale of the real estate to pay debts did not exist if the personal estate was sufficient therefor.

POINT B

The Effect of the Inventory

Section 51 of Pope's Digest of the Laws of Arkansas provided for the filing of an inventory of the assets of the estate. The inventory was filed as required by the Statute. It showed personal assets \$771.39 (R. 41).

By Section 133 of Pope's Digest of the Laws of Arkansas, it is a duty of the Probate Court at each term thereof to examine all inventories filed since the last term of such Court to see that they have been made and filed according to

Law. The inventory was so examined and approved by an order of the Ouachita County, Arkansas Probate Court (R. 44).

By Section 62 of Pope's Digest of the Laws of Arkansas inventories and appraisements are recognized as *prima facie* correct but are not conclusive for or against an executor or administrator.

The complaint filed by petitioners on July 25, 1941, alleged the payment of \$225.00 in cash as rent from lands of the estate during the time prior to the administrator's procurement of the order for a sale of the land (R. 5). Therefore, at the time of entering the order of sale, the record showed that the administrator had in his possession \$996.39 worth of personal assets, more than one-half of which was cash or bank deposits. According to the statutes and decisions cited under Point A of this argument, the Probate Court of Ouachita County, Arkansas, was without jurisdiction to order a sale of the real estate.

POINT C

Petitioners Are Deprived of the Benefits of the Arkansas Statutes

In order for the Probate Court of Ouachita County, Arkansas, to reach the decision to, and order the sale of the real estate, it was necessary for that Court to ignore the commands of the State Laws, cited and discussed under Points A and B. That the Probate Court did so ignore the Statutes above referred to, is conclusively shown by the first and final settlement of the administrator (R. 50).

It was argued by respondents below that the property was of no value; however, that is answered conclusively by the approval of the inventory by the Probate Court, in which it was filed. The cash and bank deposits were of a fixed value. The settlement of the administrator (R. 50)

was his first settlement and his final settlement. It accounts only for the sum of \$1075.00, which was the exact sum received by the administrator for the 320 acres of land.

It is therefore clearly shown by the record that the personal assets were in the hands of the administrator at the time he petitioned for, and the Court granted, the order for a sale of the land. It is also clear that such could not have happened without ignoring the commands of the State Statutes.

POINT D

As a Part of Due Process of Law, Petitioners Are Entitled to the Benefits of the State Statutes

The principle here invoked is set forth in a decision of this Court in the case of *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 76 L. Ed. 265. In that case this Court held:

“Although the prohibition of the 14th Amendment has reference exclusively to action by the State as distinguished from action by private individuals, the rights thereby protected may be invaded by the acts of a State officer under color of State authority, even though he not only exceeded his authority, but also disregarded special commands of the State Law.”

In the above decision this Court said:

“* * * But the Iowa court, without denying the lack of power of the State to authorize the discrimination effected, holds that such discrimination does not violate the Federal Constitution because it resulted from the act of private individuals and not of the State. The prohibition of the 14th Amendment, it is true, has reference exclusively to action by the State, as distinguished from action by private individuals. *Virginia v. Rives*, 100 U. S. 313, 318, 25 L. Ed. 677, 669, 3 Am. Crim. Rep. 524; *United States v. Harris*, 106

U. S. 629, 639, 27 L. Ed. 290, 294, 1 S. Ct. 601. But acts done 'by virtue of a public position under a State Government . . . and in the name and for the State,' Ex parte Virginia, 100 U. S. 339, 347, 25 L. Ed. 676, 679, 3 Am. Crim. Rep. 547, are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the State law. When a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the Federal Constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of the state law. Here, the exaction complained of was made by the treasurer in the name of and for the State, in the course of performing his regular duties; the money is retained by the State; and the judicial power of the State has been exerted in justifying the retention. Compare *Montana Nat. Bank v. Yellowstone County*, 276 U. S. 499, 72 L. Ed. 673, 48 S. Ct. 331; *Carpenter v. Shaw*, 280 U. S. 363, 369, 74 L. Ed. 478, 482, 50 S. Ct. 212."

It is clear that the courts of Arkansas have completely ignored the commands of the State Law as set forth in the points above discussed. The 14th Amendment to the Constitution of the United States, it is well settled, applies to the action of the States. Under the authority of the above decision of this Court, the State may not ignore the commands of the State Law, acting through its Legislative or an administrative agent. The same rule applies to the action of the State, acting through its judiciary. Such was the holding by this Court in the case of *Brinker Hoff-Faris Trust and Savings Co. v. Walter O. Hill, Treasurer*, 281 U. S. 673, 74 L. Ed. 1107.

As pointed out in the Argument under the above points the judiciary of the State of Arkansas could not have deprived petitioners of their property without completely ignoring the commands of the State Statutes above men-

tioned. The application of the above mentioned State Statutes would have resulted in the payment of all obligations of the Estate out of the personal assets as was required by Law.

It is respectfully submitted that the instant case calls for an application by this Court of the principles announced in the case of *Iowa-Des Moines National Bank v. Bennett, supra*. The denial of the benefits of the State Statutes is so clear that it appears to petitioners nothing further need be said.

That the denial of the benefits of the State Statutes is the denial of due process of law under the 14th Amendment to the Constitution of the United States requires little argument, especially in view of the principles announced in the case of *Iowa-Des Moines National Bank v. Bennett, supra*.

- POINT E

The Judgment on the Merits of Controversy

Petitioners' cause of action in the Probate Court of Ouachita County, Arkansas, was dismissed upon the motion of respondents wherein it was alleged that the Probate Court was without jurisdiction of the cause of action (R. 13). However, the order and decree (R. 22), makes various findings on the merits of the controversy and denies plaintiff's (Petitioners) prayer for relief and dismisses the cause of action for want of jurisdiction at the cost of petitioners.

The suit was originally brought in the Probate Court of Ouachita County, Arkansas, based upon the provisions of the fourth sub-division of Section 8246 of Pope's Digest of the Laws of Arkansas. The pertinent provisions of that Statute being as follows:

"The Court in which a judgment or final order has been rendered or made shall have power after the ex-

piration of the term, to vacate or modify such judgment or order;

• • •

“Fourth. For fraud practiced by the successful party in the obtaining of the judgment or order.

• • •”

Petitioners are completely at a loss to understand how a Court can make a finding and enter a judgment upon a cause of action, of which, such Court has no jurisdiction. However, with all due respect to the Probate Court of Ouachita County, Arkansas, and the Supreme Court of Arkansas, it appears such has been done in dismissing petitioners' complaint. The judgment (R. 22) dismisses the cause of action for want of jurisdiction, and at the same time denies plaintiffs the relief sought.

It is elementary that a judicial determination of the issues by a Court of competent jurisdiction is essential to due process of law in civil proceedings of a judicial character. 16 C. J. S. 1241, Sec. 616.

The decision of the Supreme Court of Arkansas (R. 52) and the judgment entered by that Court (R. 55) affirms the judgment of the Probate Court in all things and finds that there was no error in the proceedings and judgment of the Probate Court. With due deference to the Supreme Court of Arkansas, petitioners are unable to rationalize the action of the Supreme Court of Arkansas, in affirming the judgment of the Probate Court in all things.

As the record now stands, Petitioners are barred from attempting further relief by the judgment of a Court that had no jurisdiction of the cause of action and such judgment has been affirmed by the Supreme Court of the State.

If petitioners are to be barred upon the merits of the controversy, such judgment or order barring their rights, should be by a Court that had jurisdiction of the cause of

action. It is urged that petitioners are at least entitled to relief from that part of the judgment of the Probate Court which bars them upon the merits of the controversy, which judgment was entered by a Court that lacked jurisdiction, without the benefit of evidence and contrary to the record.

Perhaps the situation reflected by the conflicting judgment and order could be clarified by this Court's reversing the decision of the Supreme Court of Arkansas with directions to that Court to determine whether the order and decree of the Probate Court would be affirmed on the grounds that the Probate Court was without jurisdiction or whether the judgment denying petitioners the relief sought was the ground for affirmance.

POINT F

The Exercise of Discretion by the Probate Court

The argument that if the Court was without jurisdiction of the cause of action, it was without jurisdiction to enter a judgment upon the merits, made under Point E, applies with equal force and effect to the holding of the Supreme Court of Arkansas that the Probate Court correctly exercised its discretion. The Probate Court being without jurisdiction was powerless to exercise discretion.

Assuming, however, that the Probate Court had jurisdiction of the cause of action, the action of the Probate Court in dismissing Petitioners' Complaint, after making findings without the benefit of evidence, and contrary to the record, deprives petitioners of that due process of Law guaranteed to them by the 14th Amendment to the Constitution of the United States.

With due respect for the Supreme Court of Arkansas, it is hard to understand how that Court could hold that the Court below correctly exercised discretion, when the record showed that petitioners had been denied the benefits

of the Statutes heretofore mentioned. It was surely fraud upon petitioners, either intentional or unintentional, to deprive them of their property without an application of the Statutes, which was for their benefit. It, therefore, appears that the action of the Probate Court was not a correct exercise of discretion, but when viewed in the light of the record, the record showed conclusively the denial of the benefits of the Statutes, and that appears to be an abuse of discretion, if the Probate Court was vested with jurisdiction of the cause.

This holding of the Honorable Supreme Court of Arkansas also bars petitioners of their rights to prosecute their cause of action.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power, in order that the judgment and decree of the Ouachita County, Arkansas, Probate Court and the decision and judgment of the Supreme Court of Arkansas may be corrected, and that to such an end a writ of certiorari should be granted and this court should review the decision of the Supreme Court of Arkansas and finally reverse it.

Respectfully submitted.

C. M. MARTIN,
Camden, Arkansas.

HENRY B. WHITLEY,
Magnolia, Arkansas.

J. R. WILSON,
El Dorado, Arkansas,
Attorneys for Petitioners.

By J. R. WILSON,
of Counsel for Petitioners.